Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1448

MARGARET E. GRIGSBY, M.D.,

Petitioner,

v.

STERLING DRUG, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CLEMENT THEODORE COOPER, ESQUIRE
918 F Street, N.W. (300-302)
Washington, D.C. 20004
(202) 393-3900
Reg. No. #2576

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0626

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

MARGARET E. GRIGSBY, M.D.,

Petitioner,

v.

STERLING DRUG, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Margaret E. Grigsby, M.D., petitions this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSIONS	14
APPENDIX "A" (Judgment and Memorandum of the United States Court of Appeals District of Columbia Circuit	1a

TABLE OF AUTHORITIES

Cases:

Avery v. Cleary, 132 U.S. 604 (1889)	9
Burnett v. New York Cent. R. Co., 380 U.S. 424, 85 S. Ct. 1050 (1965)	10,11
Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529, aff. 259 N.Y. 620, 173 N.E. 892 (1930)	9
Damiano v. Pennsylvania R. Co., 161 F.2d 534 (1947, CA 3rd) cert. den. 332 U.S. 762, 68 S. Ct. 65, cert. den. 340 U.S. 821, 71 S. Ct. 54	13
Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 79 S. Ct. 760 (1959)	11
John Hopkins Univ. v. Hutton, 422 F.2d 1124 (4th Cir. 1970)	9
Jones v. Rogers Memorial Hosp., 143 U.S. App. D.C. 51, 442 Fed. 2nd 773 (D.C. Cir. 1971)	8

	Page
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 808 (1957)	11
Upton v. McLaughlin, 105 U.S. 640 (1882)	9
Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018 (1949)	13
Constitutional Provisions Involved:	
Amend. 7, U.S. Const.	3
Amend. 5, U.S. Const.	3
Amend. 14, U.S. Const.	3
Federal Statutes Involved:	
21 U.S.C. 505, et seq.	8
28 U.S.C. 1234(1)	2
5 U.S.C. 8131	3
21 U.S.C. 331(o)	3
12 D.C. Code 301 (1973 edit)	3,4
5 U.S.C. 8101 et seq.	10,12
Federal Rules Involved:	
Rule 56, F.R. Civ. P.	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MARGARET E. GRIGSBY, M.D.,

Petitioner,

v.

STERLING DRUG, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I.

OPINIONS BELOW

The Judgment and Memorandum of the United States District Court and the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia are printed in the Appendix to this Petition. (Appendix 1a).

II.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was dated and entered on October 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

III.

QUESTIONS PRESENTED

1. Whether the affirmation by the United States Court of Appeal for the District of Columbia Circuit, affirming the Judgment and Order of the United States District Court on the basis of its inconsistency with previous judicial interpretation of the three years statute of limitation, where facts giving rise to the cause of action for fraud were fraudulently concealed and continued to be fraudulently concealed, was violative of Petitioner's Constitutional Right to a trial by jury?

2. Whether the failure of the District Court to apply the doctrine of Tolling of a Statute of Limitation during the period in which a physician is employed in the services of the United States Government on Foreign soil, thereby barring access to a Jury Trial, constitutes a denial of equal protection of the laws?

3. Whether the failure of the District Court to apply the doctrine of Tolling of a Statute of Limitation period pending a declaratory Election by the United States Department of Labor to pursue a common law remedy against a Third person for injuries sustained by

a physician while in the employ of the United States, on Foreign Soil, constitutes a denial of Due Process of the Law?

IV.

CONSTITUTIONAL PROVISIONS

1. Amend. 7, U.S. Const.
2. Amend. 5, U.S. Const.
3. Amend. 14, U.S. Const.

V.

STATUTES INVOLVED

5 U.S.C. 8131, provides as follows:

"(c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury . . .".

21 U.S.C. 331(o)

12 D.C. Code 301, 1973 edition, provides as follows:

"Except as otherwise specifically provides by law, actions for the following purposes may not be brought after the expiration of the period specified

below from the time the right to maintain the action accrues: . . .

(8) for which a limitation is not otherwise specifically prescribed – 3 years."

IV.

STATEMENT OF THE CASE

Petitioner, Margaret E. Grigsby, M.D., brought an action against Sterling Drug, Inc., et al. in the United States District Court seeking damages due to negligence; Breach of Warranty; Strict Liability in Tort; and Misrepresentation (Fraud and Deceit). The Court later granted Appellant-Plaintiff's Motion for Leave to amend the complaint. Thereafter, Petitioner filed an amended complaint under the same theories seeking claims against Sterling Drug, Inc., and Winthrop Laboratories, Inc.

Respondent filed a Motion for Summary Judgment pursuant to Rule 56, F.R. Civ. P. seeking a Judgment and Order dismissing Petitioner's complaint upon the ground that the action was barred by the 3 year Statute of Limitations, 12 D.C. Code 301 (1973 Edit.). Petitioner filed an opposition to Respondents motion alleging, under oath, inter alia, that she did not discover, as a medical fact, that Aralen was the cause of her hearing loss until December, 1973.

The motion for Summary Judgment was heard by the Trial Court. The Trial Court, Sua Sponte, entered an Order requiring Petitioner to file an amended Count IV setting forth, in greater detail, particularized fraudulent misrepresentations which were made by Respondent.

The Trial Court entered a Memorandum Order granting Respondents' Motion for Summary Judgment. (Appendix ????). The United States Court of Appeals for the District of Columbia, Per Curiam, affirmed without comment, the decision of the United States District Court of the District of Columbia. (Appendix 1a through 2a). Thereafter, Petitioner's Petition for Rehearing. Petition and suggestion for rehearing was denied.

VII.

STATEMENT OF FACTS

On July 1, 1966, Petitioner was appointed to the position of Medical Epidemiologist with the Smallpox Eradiction/measles Control Program. Petitioner, a medical doctor, was thereafter assigned to Ibadan, Western State, Nigeria. Petitioner's tour of duty began on October 23, 1966, and was to continue until September 30, 1968.

As part of the United States Public Health Service's prophylaxis or combative treatment for anticipated malarial exposure, Aralen was prescribed as a suppressant. Petitioner was administered 500 miligrams of Chloroquine weekly. The Drug was dispensed by and under the direction of the United States Public Health Service with which Petitioner was assigned. The drug was ingested once per week, each week in 500 mg dosages, for a period of approximately two years.

Aralen was manufactured by the Respondents. Aralen (Chloroquine) is known chemically as one of the four aminoquinelines. The drug is synthetically produced and

is similar in chemistry to quinine, atrabrine, plaquinil and triquin.

Chloroquine came into notoriety during World War II when the quinine supply used by troops into the Pacific Theater of War was either cut off or difficult to obtain. The Federal Government was then seeking a substitute for the anti-malarial atrabrine which was the drug of choice at the time but which had unpleasant side effects in the treatment of malaria. A substantial effort was undertaken by the National Research Council on a urgent, priority basis and chloroquine was found most suitable for short term use for the treatment of malaria. According to one account, the Federal Government spent some $10 million dollars on its anti-malarial program. Respondent played a major role, with Government, in the synthesization of atrabrine which resulted in the manufacture of the drug in question, ARALEN.

In 1946, Aralen, Respondents' trade name for chloroquine, was placed on the market for the *treatment of malaria*, and was for malaria only.

On or about August 16, 1968, while in Ibadan, Petitioner began to feel dizzy and faint and nauseated and several times vomited. While attempting to eat dinner, Petitioner suffered a severe attack of vertio and nausea. After retiring to bed, Petitioner began to experience a market ringing in both ears. This ringing in the ears is medically known as "tinnitus". Petitioner was seen by a Peace Corps Doctor who prescribed anti-vertig and anti-histamine medication as well as textracycline. For the days that followed, Petitioner again experienced mild to moderate attacks of vertigo and hearing loss. The hearing loss continued to deteriorate and Petitioner was returned to Washington,

D.C. where she arrived on October 1, 1968. Petitioner then presented herself to the Department of State Medical Division for a separation physicial examination and that examination having confirmed Petitioner's hearing loss, she was referred to a Dr. Richard Fields, an Ear, Nose and Throat Specialist. Petitioner was advised to continue to take Chloroquine tablets after her return to Washington, D.C. Dr. Fields advised Petitioner to discontinue taking Chloroquine. On November 1, 1968, Petitioner became completely and totally deaf and was hospitalized. That condition remains with the Petitioner to this day.

Petitioner continued with medical treatment but at no time was Petitioner told that her hearing loss was caused by Chloroquine consumption. Since Respondent did not and had not clearly and definitively advise and inform physicians as well as patients that Chloroquine consumption might result in nerve type deafness. Petitioner was first alerted that there was a casual connection between her hearing loss and the consumption of Chloroquine when she read a certain passage in Physicians Desk Reference Manual, 1975 Edition, when Respondents first reported that disability as a related one to the consumption of their product. Finally, Petitioner did not discover, as a medical fact, that Chloroquine was the direct and proximate cause of her hearing loss until December, 1973 after which time, she filed suit in the United States District Court.

VIII.

REASONS FOR GRANTING THE WRIT

The ambiguity concerning time limitation in which an injured party may bring an action for fraud, where actionable facts are fraudulently concealed, is the subject of this controversy. The doubt is derived from the District Court's misinterpretation in the present case as measured against prior case law in the District of Columbia. The District Court construction of the Statute of Limitation rule has denied the Petitioner's right to a trial by jury.

The statute of limitation was originally established in equity, and has since been made applicable in trials at law. The Application of the doctrine of Courts of Equity to withhold relief from those who have delayed the assertion of their claim for an unreasonable length of time does not depend on mere lapse of time, but upon change of situation during repose, rendering it inequitable to afford relief.

When a Public Law, such as the Food, Cosmetic and Drug Act, 21 U.S.C. 505, *et seq.*, demands an accurate account by an industry, a knowing misrepresentation by the reporting party constitutes a fraud. The duty to accurately report continues – so does the fraud. This duty extends to the public which the statute aims to protect and especially to those members of the public who rely on the representations of the reporting party.

That Statute of Limitation does not began to run until the injured party knows, or through reasonable diligence should have known of actionable facts giving rise to a cause of action. *Jones v. Rogers Memorial Hosp.*, 143 U.S. App. D.C. 51, 442 Fed. 2nd 773 (D.C.

Cir. 1971); *John Hopkins University v. Hutton*, 422 F.2d 1124, (4th Cir 1970). This Court had held in *Upton v. McLaughlin*, 105 U.S. 640 (1882) and *Avery v. Cleary*, 132 U.S. 604, (1889):

> "Where there has been no negligence or laches on the part of a Plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the Statute of limitation does not begin to run until the fraud is discovered by, or becomes known to the party suing or those in privity with him."

The questions of "negligence", "due diligence", and "reasonableness" are questions to be decided by the trier of fact. *John Hopkins Univ. v. Hutton,* 422 F.2d 773, (4th Cir. 1971). In the present case "due diligence" was admittedly in issue. The granting of Summary Judgment by the District Court defeated Petitioner's Constitutional guarantee of right to a fair trial by jury and deprived petitioner of property without due process of law. This conclusion is supported in *Conklin v. Draper,* 229 App. Div. 227, 241 N.Y.S. 529, aff. 259 N.Y. 620, 173 N.E. 892 (1930):

> "A legal right to damage for an injury is property and one cannot be deprived of his property without due process of law. There can be no due process unless the party deprived has his day in Court and his right until a Statute deprives him of his remedy he is deprived of due process. It is also an ancient maxim of the common law that 'where there is a right there is a remedy'. What a mockery to say one, grievously wronged, 'certainly you had a remedy, but while your debtor concealed from you the fact that you had a right the law stripped you of your remedy.' "

5 U.S.C. 8131 supplied further ambiguity in determining the point at which an employee of the United States has a cause of action against a third party derived from the employee's Federal employment.

Section 8131(a)(1) and (2) mandates that the Secretary of Labor "may require" that the employee either assign his or her claim to the United States or prosecute the same in the name of the employee. The legislative motivation here is that the Department may recover amounts compensable under the Federal Employee Compensation Act, 5 U.S.C. 8101, *et seq.* Because of the superior resources of the Department of Labor, the phrase "may require" at least should read to require notice to the employee when the cause of action is found to exist. A contrary finding, as in this case, could cut short the employees' access to the judicial system by a statute of limitation defense.

2. Protection afforded employees of the United States Government who serve on Foreign soil and who sustain injuries resulting from the use of a drug is constitutionally paramount. These employees must be allowed access to the Federal Courts and Jury Trials demanded. The interest of the drug manufacturer, in this instance, is not superior to nor equal to the rights of an injured employee. Under the Federal Law comparison is warranted by a case law study of decisions emanating out of this Court.

In *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 85 S. Ct. 1050 (1965), this Court declared (in ruling on the tolling of the Statute of Limitation under the Federal Employee's Liability Act) that the Statute is tolled whenever to do so would effectuate the Congressional purposes in enacting the "humane and remedial" Federal Employers Liability Act.

Where Fraud has been alleged, as was alleged by the Petitioner, in verified form, the Statute of Limitations is tolled until the fraud is discovered and courts are duty bound to recognize that no man can take advantage of his own wrong by fraudulent concealment of material facts, whether direct or indirect, and thereafter assert the Statute of Limitations as a defense. *Glus v. Brooklyn Eastern Dist. Terminal,* 359 U.S. 231, 79 S. Ct. 760 (1959). This Court assured that Petitioner, like any other litigant, would be entitled to a Jury determination. In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 808 (1957), the Court promised that:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this (Supreme) Court (of the United States) is vigilant to exercise its power to review in any case where it appears that the litigants have been improperly deprived of that determination."

Issues of disability of the petitioner and tolling of the Statute of Limitations, disability resulting from war tolls the Statute of Limitations. *Burnett v. New York Central R. Co., supra.* But compare the invokement of the doctrine of tolling relative to disability from war, with disabilities incurred by a Federal Employee, in the line of duty, on Foreign soil, during peace time conditions. Petitioner is a distinguished professor of Internal Medicine with a sub-specialty in Tropical Diseases. Petitioner's willingness to enter the Public Health Service of the United States with an assignment to a Foreign Country, Nigeria, which became the target of a comprehensive and all out mission to eradicate Smallpox and Measles. The suggested and prescribed

drug, which was indeed the offending and hostile agent, ingested by petitioner, was, without doubt, the direct and proximate cause of Petitioner's disability. To deny Petitioner access to a Jury Trial, under those circumstances constitutes a flagrant violation of the right to trial by Jury and constitutes a denial of equal protection of the laws.

3. Procedurally, every citizen has the right to due process of law by seeking vindication of rights in the Federal Courts. Not only is the doctrine humane but it is judicially clear in scope, effect and purpose.

Where Congress has vested a right in the Secretary of Labor to pursue a third party action on behalf of the United States and the Petitioner, as was the case here, reliance upon that authority vested in the Secretary is reasonable if not well justified. 5 U.S.C. 8131. Section 8131, relegates the Secretary of Labor to the status of "watch dog" in taking care that rights of action against third persons for injuries sustained while in Federal employ will be and ought to be protected. Theoretically and suggestively, the Statute of Limitation is, for equitable reasons, tolled until the Secretary of Labor makes it clear, by written affirmation and notice, that he will or will not pursue a third party action against a tort feasor. This doctrine is advised for logical, practical and economic reasons. *Firstly,* the Secretary of Labor has full investigative resources at his command. *Secondly,* third party actions can be timely pursued while the Secretary is in fact making payments for compensation to an injured federal employee. *Thirdly,* the preservation of federal funds doctrine dictate that the United States pursue the first line of

legal assault in seeking to recover money from and indemnify itself from third party Tort feasors.

However, the issue is shaped in a more refined fashion when the doctrine of tolling is invoked, as it ought to be, as a result of payment of Compensation awards. See *Damiano v. Pennsylvania R. Co.*, 161 F.2d 534 (1947, CA 3rd) *cert. den.* 332 U.S. 762, 68 S. Ct. 65, *cert. den.* 340 U.S. 821, 71 S. Ct. 54. Moreover, this Court has held that a Statute of Limitations does not began to run until the accumulated effects of the deleterious substance manifest themselves. *Urie v. Thompson,* 337 U.S. 163, 69 S. Ct. 1018 (1949). Petitioner's injury did not manifest itself immediately. The Trial Court was no doubt misled by Sterling in asserting that the vertigo (which is only one of the attending signs preceding or leading up to neuro sensory hearing loss) was in fact the disability.

To ignore or skirt around the legion of pronouncements by this Court suggests a need for Judicial clarification and a reaffirmance that no person will be denied due process of law.

IX.

CONCLUSIONS

For the foregoing reasons, Petitioner respectfully requests that the petition for Writ of Certiorari to review the Decision of the United States Court of Appeals for the District of Columbia be granted; That an Order to that effect be entered, and the Court below and the counsel be notified of the granting of the Petition.

Respectfully submitted,

CLEMENT THEODORE COOPER
918 F Street, N.W. (300-302)
Washington, D.C. 20004
(202) 393-3900
Reg. No. #2576

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MARGARET E. GRIGSBY, M.D.,	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No.
	)	74-1194
	)	
STERLING DRUG, INC.	)	
and	)	
WINTHROP LABORATORIES,	)	
INC.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff, a physician, lost considerable hearing in her left ear in 1968. In this complaint filed in August, 1974, she alleges that her injury was caused by defendants' drug Aralen (chloroquine phosphate), which the Public Health Service prescribed for her over a long term as an anti-malarial prophylaxis while she was in Nigeria in government service. She has received some compensation from the Government for her injuries, but she now brings this action against the drug manufacturer seeking $3 million in damages.

Although phrased as separate causes of action sounding in negligence, breach of warranty, products liability and

fraud, plaintiff's complaint essentially claims that defendants knew or should have known that their product was not safe, especially for use as a prophylaxis, but that they failed to so inform the medical profession, and that as a result of their failure adequately to test their product, or the suppression of adverse research data, if there was any, she sustained her injuries. Defendants moved for summary judgment on the basis of the three-year statute of *12 D.C. Code §301(8) (1973),* after discovery from plaintiff and others. The issues have been briefed and argued and can be resolved as a matter of law on the undisputed facts contained in the affidavits and depositions filed and a further particularized statement of the fraud count, requested by the Court.

The statute of limitations on each of the causes of action begins to run from the time plaintiff learned, or in the exercise of due diligence could have learned, that her injuries were not simply misfortune but resulted from an undisclosed defect in defendants' product. *Jones* v. *Rogers Memorial Hospital,* 143 U.S. App. D.C. 51, 442 F.2d 773 (1971); *Wiren* v. *Paramount Pictures*, 92 U.S. App. D.C. 347, 206 F.2d 465, (1953), *cert. denied,* 346 U.S. 938 (1954). It is undisputed that plaintiff knew she had suffered substantial hearing loss in 1968, although perhaps the full extent of her injuries had not yet become known. The issue is whether or not she knew, or in the exercise of due diligence should have discovered, that a defect in defendants' product had caused her injuries, contrary to defendants' continuing representations that the product was safe.

The Court is not unmindful that these are issues which must be left to the trier of fact in all but the most exceptional cases, for "even where there is no dispute as to the

evidentiary facts . . . but only as to the conclusion [whether certain efforts did or did not constitute "reasonable diligence"] to be drawn therefrom," a material factual issue may remain. *Johns Hopkins Univ.* v. *Hutton,* 488 F.2d 912, 918 (4th Cir. 1973), *cert. denied,* 416 U.S. 916 (1974). *See also, Jones* v. *Rogers Memorial Hospital, supra,* 442 F.2d at 775 n. 2. Nonetheless, where the evidence is such that the Court could only permit the issue of due diligence to be resolved by a jury in one way, summary judgment may be appropriate.* *See Hoeflich* v. *William S. Merrell Co.,* 288 F. Supp. 659, 662 (E.D. Pa. 1968); *Carney* v. *Barnett,* 278 F. Supp. 572, 575 (E.D. Pa. 1967). After careful consideration of the undisputed facts in this case, the Court has concluded that in 1968 plaintiff knew, or through the exercise of due diligence could have known, that she had a claim that her injuries were caused by a defect in defendants' product. Therefore, the statute of limitations has run and defendants must be granted summary judgment.

It is undisputed that plaintiff took 500 mg. per week of Aralen between September 1966 and October 1968. In August, 1968, she felt dizzy, became nauseated and had a feeling her ears were stuffed with cotton. Her hearing was suppressed and distorted. Things improved somewhat after medical attention but her hearing in her left ear was thereafter substantially impaired. After her return to the United States in October, 1968, she was referred to a specialist, Dr. Fields. After examining her, Dr. Fields concluded the "most likely cause" of her hearing loss was

*It is important to note that at oral argument plaintiff's counsel conceded that there are no facts in addition to those already before the Court bearing on the issue of plaintiff's knowledge or diligence.

chloroquine toxicity (Fields deposition, 27). He told her to stop taking the chloroquine and advised her there was "a possibility" that it was the cause of her hearing loss. (Fields deposition, 10; Grigsby deposition, 45-6).

Having been informed of this "possibility," a great many avenues of further investigation were open to Dr. Grigsby which she did not pursue. There were several recent references in the medical literature regarding hearing loss as the result of chloroquine toxicity. Dr. Grigsby never asked Dr. Fields any questions regarding the basis for his diagnosis. Her hospital records contained the statement by another doctor, "rule out chloroquine toxicity," indicating the strong suspicion of such toxicity (Fields deposition, 24), but Dr. Grigsby never saw them until immediately prior to bringing this lawsuit (Grigsby deposition, 53). *Dr. Grigsby testified she had never seen the package insert describing the known side effects of chloroquine (Grigsby deposition, 17), although as a physician she had a statutory right to request one from the manufacturer. 21 U.S.C. §331(o).* Nor did Dr. Grigsby initiate any other communication with the manufacturer to attempt to determine whether any similar side effects had been reported. *Cf. Hoeflich* v. *William S. Merrell Co., supra,* 288 F. Supp. at 661 n.2.

What plaintiff claims she did do, however, as a result of the suspicions Dr. Fields had aroused, was to consult the *Physicians' Desk Reference* (*PDR*), a standard medical manual, for the years 1968 through 1973. Initially plaintiff sought to avoid the statute of limitations by claiming the information supplied by the manufacturer in this reference amounted to fraudulent concealment sufficient to toll the statute of limitations, *see Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946), in that the *PDR* "did not report any connection between the use of ARALEN and Neuro-

sensory Hearing Loss," until the 1974 edition. (Grigsby affidavit, April 11, 1975, ¶ 10). However, it subsequently developed that the *PDR* for the years 1969, 1970 and 1971 did emphasize the various toxicity reactions plaintiff experienced and in fact contained the following specific statement: "A few cases of a nerve type deafness have been reported after prolonged therapy, usually in high doses." All that was added in 1974 was the report of a particular case strikingly similar to plaintiff's: "Tinnitus [ringing in the ears] and reduced hearing have been reported in a patient with preexistent auditory damage, after administration of only 500 mg. once a week for a few months."

Plaintiff has not, in fact, discovered any new information which has enabled her to bring the lawsuit. See Emmett v. *Eastern Dispensary and Casualty Hospital,* 130 U.S. App. D.C. 50, 396 F.2d 931, 937-8 (1967). Rather, as her condition has worsened, it has become more of an impediment to her in her career, and, as counsel stated at oral argument, she was advised by a personal friend who is a lawyer that she might have a good legal case. (*See also,* Grigsby affidavit, April 11, 1975, ¶ 11). Such subjective factors do not preclude the running of the statute of limitations. *Cf. Maddox* v. *Andy's Refrigeration & Motor Service Co.,* 160 A.2d 799 (D.C. Mun. App. 1960).

The three-year period of time since plaintiff's cause of action arose having run, and there being no material dispute of fact precluding the conclusion that plaintiff knew or in the exercise of due diligence could have learned of the facts giving rise to her cause of action, summary judgment shall be granted in favor of defendants.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

July 25, 1975.

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1930 September Term, 1975
Civil 74-1194

Margaret E. Grigsby, M.D., Appellant
v.
Sterling Drug, Inc., a corporation, et al

Appeal from the United States District Court
for the District of Columbia.
Before: McGOWAN, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

In consideration of the foregoing, It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

APPENDIX "A"

(Judgment and Memorandum of the United States Court of Appeals District of Columbia Circuit.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1930 September Term, 1976
Civil 74-1194

Margaret E. Grigsby, M.D., Appellant

v.

Sterling Drug, Inc., a corporation, et al

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing. It is ordered and adjudged by this Court that the judgment of the

District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 7 1976

GEORGE A. FISHER
CLERK

Supreme Court, U. S.
FILED
MAY 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1448

MARGARET E. GRIGSBY, M.D., *Petitioner*

v.

STERLING DRUG, INC., ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES C. GREGG
GARY W. BROWN
1625 K Street, N.W.
Washington, D. C. 20006
Attorneys for Respondents

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N.W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

16077-5-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MARGARET E. GRIGSBY, M.D., *Petitioner*

v.

STERLING DRUG, INC., ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Memorandum and Order of the District Court is annexed to the petition as Appendix 12 through 52. The Judgment of the Court of Appeals (there was no opinion) is also included in Petitioner's appendix 62.

JURISDICTION

Petitioner invokes the jurisdiction of this Court via 28 U.S.C., Sec. 1254(1), erroneously cited by Petitioner as 28 U.S.C., Sec. 1234(1)(sic).

QUESTIONS PRESENTED

Respondent respectfully suggests that questions raised by the Petitioner should more accurately be:

(1) Whether a lower court decision involving the application of a local statute of limitations predicated on undisputed facts raises a Constitutional issue of the type that would warrant the issuance of a Writ of Certiorari?

(2) Can a question be raised for the first time in a Petition for Writ of Certiorari to this Court not having been raised in either of the proceedings below?

STATEMENT OF THE CASE

The statement of the case is set forth in the District Court Memorandum and Order, appendix 1a through 5a.

ARGUMENT

The above case was decided by both the trial court and the appellate court on purely local issues involving the application of the District of Columbia Statute of Limitations, 12 D.C. Code 301 (1973 Ed.) to an essentially undisputed factual matter. The trial court held, and the United States Court of Appeals for the District of Columbia affirmed, that Petitioner's claim for personal injury (loss of hearing allegedly attributable to Petitioner's ingestion of the drug Aralen) was barred because the action was not instituted within three years of the date that the cause accrued.

By Memorandum and Order, attached to and included in Petition as Exhibit 1a-5a, the United States District Judge in this action, in which jurisdiction was invoked on the basis of diversity, considered each of the points raised by and on Petitioner's behalf. The issue was whether she knew, or in the exercise of due diligence should have discovered, that an alleged defect in defendant Respondent's product had caused her injuries, contrary to alleged continuing representations that the product was relatively safe (2a).

Petitioner does not appear to take issue with the legal principle upon which the motion for summary judgment was granted. As noted by the footnote on 3a, counsel for petitioner at oral argument on the motion conceded that there were no facts in addition to those already before the Court bearing on the issue of Petitioner's knowledge or diligence.

The essential facts were that Petitioner noted the onset of her symptoms in August 1968 with a "feeling that her ears were stuffed with cotton" (3a); that after her return to the United States in October 1968, she was referred to and examined by a specialist who concluded that the "most likely cause" of her hearing loss was chloroquine toxicity (Aralen contains chloroquine); that the Physicians' Desk Reference (PDR) for the years 1969 through 1971 referred specifically to some cases of nerve type deafness reported after prolonged therapy with the use of Aralen; that Petitioner did nothing to follow up on the possible relation between the drug and her condition between late 1968 and until suit was filed in 1974 other than consult the PDR's for the appropriate years; that all that was added in 1974 was a report of a particular case similar to Petitioner's; and that Petitioner had not

". . ., in fact discovered any new information which enabled her to bring her lawsuit." (3a)

Under these circumstances, the motion for summary judgment was properly granted and the judgment properly affirmed.

Petitioner raises no constitutional questions other than those basically inherent in any case wherein a summary judgment is rendered predicated upon undisputed facts and the application of local statutes of limitations.

She does raise, for the first time in this proceeding, a question as to whether limitations are tolled during a period that a person is employed outside the country. Even if this were an issue, however, and even if it were a legally recognized exception to the bar of limitations (which it is not and for which no authority has been cited), it avails Petitioner nothing because the undisputed facts disclosed that she was physically present in the United States from October 1968, through the date suit was filed.

She also raises a question, again for the first time, as to whether limitations should have been tolled during a period when the Department of Labor had an option of prosecuting an action on behalf of a government employee who has sustained a work-related compensable injury. This likewise does not avail Petitioner because the Statute involved, 5 U.S.C. 8131, does not purport to create, limit or expand the employee's rights against third party tort feasors, nor does it by any reasonable interpretation expand the employee's rights against third parties if the Secretary is derelict in his duties and fails to investigate or prosecute a third party claim. c.f. *United States* v. *Limbs*, 356 F.Supp. 1004 (D. Ariz. 1973).

CONCLUSION

Since there are no supportable reasons for granting the writ, Respondent respectfully submits that Petition should be denied.

Respectfully submitted,

JAMES C. GREGG
GARY W. BROWN
1625 K Street, N.W.
Washington, D. C. 20006
Attorneys for Respondents

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N.W.
Washington, D. C. 20006